SUPREME COURT, U. S.

MAY 14 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1968

No. 1301

ARTHUR I. SNYDER,
Petitioner,

vs.

JOURNAL PUBLISHING COMPANY, a Florida Corporation, W. H. HARWELL, JR., and BILL ROBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported in 214 So. 2d 90.

QUESTIONS PRESENTED

We prefer to restate the questions presented as follows:

1. Whether Or Not The Complaint As Amended Stated A Cause Of Action For Libel Per Se In The Light Of Applicable State And Federal Decisions.

2. Whether Or Not The Lower Court Could Have Disposed Of The Case By Granting A Summary Judgment.

STATEMENT OF THE CASE

Petitioner sued respondents for alleged libel arising out of an article published in the North Dade (Florida) Journal on April 12, 1967 (R. 1-8). Respondents moved to dismiss (R. 9), the court denied the motion, respondents answered (R. 10-13), and the parties utilized the various pre-trial discovery procedures provided for by the Florida Rules of Civil Procedure.

Respondents moved for summary judgment (R. 48) and set the motion for hearing at the pre-trial conference. Before the motion was heard, petitioner moved to amend his Complaint (R. 40-43).

At the pre-trial conference, the trial court granted petitioner's motion to amend (R. 52) and continued the scheduled hearing on the motion for summary judgment (R. 79). Respondents then filed a Motion to Dismiss (R. 82-83), and, prior to the scheduled trial date, the trial court heard argument on this motion and the motion for summary judgment and reserved decision on both.

Thus, the court had under advisement at the same time the Motion for Summary Judgment which was based

upon the earlier pleadings and depositions and exhibits in the court file and the Motion to Dismiss directed to the Complaint as amended.

By Order dated February 8, 1968, the trial court granted the Motion to Dismiss. The court said the article petitioner complained of was not libelous per se and that the court was not bound by innuendoes in the pleadings alleging a libel per se when an examination of the article itself showed it was not.

The court further said that the dismissal was with prejudice because petitioner had admitted (in his deposition which the court had considered during the earlier argument on respondents' Motion for Summary Judgment) that he had sustained no special damages and, therefore, could not amend to state a cause of action for libel per quod (R. 510-511).[1]

Petitioner appealed to the District Court of Appeal of Florida, Third District, which on September 10, 1968, affirmed on the authority of *Adams* v. *News-Journal Corporation*, Fla., 1955, 84 So. 2d 549, and *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254.

The District Court of Appeal denied rehearing and on January 30, 1969, the Supreme Court of Florida thereafter denied certiorari, stating it was "without jurisdiction."

The Complaint As Amended

In the Complaint as amended, petitioner set out an article that had appeared in the April 12, 1967 issue of the North Dade Journal which stated:

1. Petitioner makes no claim he did sustain any special damages, and for that reason, we are not discussing that point here.

"ONE MAN COULD HAVE STOPPED IT . . ."

"THE TENSION was there and it was so thick you could cut it with a knife.

"And then the statement, the repulsive statement, and the charges, the weeping—and finally the control.

"North Miami Beach City Council candidate Jack Becker was saying that Councilman and Mayor candidate Bill McDonald was anti-semitic, against Jews.

"You could accuse Bill McDonald of a lot of things. You could say that he has trouble getting his point across. You could say that council meetings drag on and on because he argues continually with his chief antagonist, Mayor Arthur Snyder.

"But you cannot say Bill McDonald is anti-semitic. It is neither in the nature of the man, nor in the nature of politics in North Miami Beach.

"Politically it would be suicide because of the heavy Jewish population. Practically, it could not be because McDonald has Jewish running mates. Emotionally it could not be because he wouldn't want the mark it would leave on the spirit.

"THE ACCUSATION against McDonald was more than simply an isolated charge. It was symptomatic of the type of politics that has scavenged the town for too many years.

"McDonald showed remarkable control when he calmly answered after watching his wife flee the room in tears because she, too, was named.

"A lot of the audience obviously had a bellyful, because McDonald drew resounding applause when he defended himself. And he drew it from people in opposite political camps, who only minutes before had snickered at him.

"THERE WAS A MAN who could have stopped it. His name is Arthur Irving Snyder, and he is the mayor of North Miami Beach. He holds the gavel at meetings and controls the talk.

"Only a few weeks ago he made a grand speech about keeping politics out of council meetings. Not only did he not keep them out last week, but he let bigotry and intolerance in.

"And then he asked a reporter not to write about it.

"My wife says there is an intangible form of justice that seeks men out. They can scoff at things dear for only so long, and one day they come face to face with this very personal brand of justice.

"North Miami Beach needs more people who believe it."

He alleged that the particular words in the article which libeled him were:

"ONE MAN COULD HAVE STOPPED IT . . ." (Meaning the Plaintiff).

"THERE WAS A MAN WHO could have stopped it. His name is Arthur Irving Snyder, and he is the mayor of North Miami Beach. * * *"

"Only a few weeks ago he made a grand speech about keeping politics out of council meetings. Not only did he not keep them out last week, but he let bigotry and intolerance in."

(R. 40-42).

In his Complaint as amended, he contended these words accused him of

a) Being a religious bigot;

b) deliberately and for bad motives allowing a governmental meeting to become infected with religious bigotry;

c) misconduct in office; and

d) making a forum available to allow another to accuse a public officeholder of religious bigotry;

and that as a result, he had been injured in his office as Mayor of North Miami Beach and in his profession as an attorney (R. 42).

In his petition, he contends the article falsely accused him "of tolerating religious bigotry amongst his councilmen because he did not restrict their freedom of speech during debate." (Pet. 6)

ARGUMENT

Introduction

Petitioner argues that his Complaint as amended states a cause of action because he alleged that the article he complained of accused him of bigotry or tolerating bigotry and was published with actual malice. He virtually ignores the article itself, apparently on the theory that his conclusions as to what the article says are binding on the court without reference to the article itself.

We submit that the test is what the article says and not what the petitioner says it says. Applying that test, the article did not accuse petitioner of bigotry or of tolerating it.

Even if it did, it was not libelous per se on the authority of *Sweeney* v. *Patterson*, D.C. Cir. 1942, 128 F. 2d 457, certiorari denied 317 U. S. 678, and related cases, because it conceded that petitioner was a public official and that the constitutional privilege of *New York Times Co.* v. *Sullivan,* supra, applies (Pet. 7, 11, 12).

Further, on the record here, the lower court could have reached the same result it did—dismissal of the case —by granting the Motion for Summary Judgment because there was no showing of actual malice.

POINT ONE

WHETHER OR NOT THE COMPLAINT AS AMENDED STATED A CAUSE OF ACTION FOR LIBEL PER SE IN THE LIGHT OF APPLICABLE STATE AND FEDERAL DECISIONS

Article Not Libelous Per Se

Using the "as-the-common-mind-would-understand-it" rule of interpretation of *Loeb* v. *Geronemus,* Fla., 1953, 66 So. 2d 241 (Pet. 9), we submit that a fair interpretation of the article insofar as it applies to petitioner is this:

Petitioner, the mayor of North Miami Beach and presiding officer at city council meetings, failed to exercise proper control of a council meeting. Despite his prior statements about keeping politics out of council meetings, petitioner failed to stop a candidate for office when he began making political comments. This resulted in Becker's accusation that McDonald, a councilman and candidate for office, was anti-Semitic.

The lower court interpreted the article the same way.

The Order of February 8, 1968, stated:

> "I further find that the article complained of concerned a public official, (the Plaintiff-Mayor) and the manner in which he presided over the meeting of his council and that the article represented the opinion of the author and constitutes privileged criticism or fair comment."
>
> (R. 511).

In doing so, the court's approach was in accord with that of the appellate courts in Florida that a court is not bound by conclusory allegations in pleadings in determining the meanings of words and whether they are libelous per se.

In *Ross* v. *Gore,* Fla., 1950, 48 So. 2d 412, 416, the court said:

> "When the statement alleged to be libelous could not properly leave the impression charged in the innuendo, there is no issue for the jury."
>
> 48 So. 2d p. 416.

In *Hevey* v. *News-Journal Corporation,* Fla. App., 1963, 148 So. 2d 543, 553, the court said:

> ". . . In our opinion the hereinabove quoted subparagraphs (a), (b) and (c) of Paragraph III of the complaint, when tested in the light of the editorial to which they refer, do not independently or collectively have the connotation attributed to them, that is to say, the editorial is not libelous per se in those particulars. . . .
>
> "Construing the editorial as a whole, however, we conclude that it is actionable per se in the particulars specified by quoted subparagraph (d) of Paragraph III in that by clear innuendo and inference it charges that the plaintiff is cheating the taxpayers by hiring incompetents for city jobs. . . ."
>
> 148 So. 2d p. 553.

It is well established and has long been the law that the innuendo in a libel complaint cannot be used to change or enlarge the meaning of words. *Cosgrove Studio and Camera Shop, Inc.* v. *Pane,* 1962, 408 Pa. 314, 182 A. 2d 751, 754; *Penry* v. *Dozier,* 1909, 161 Ala. 292, 49 So. 909, 913; *Wisner* v. *Nichols,* 1913, 165 Iowa 15, 143 N.W. 1020,

1024; 33 American Jurisprudence 220, 221, *Libel and Slander*, §162(b). See also, *Shiell* v. *Metropolis Co.*, 1931, 102 Fla. 794, 136 So. 537, 541.

Thus, the fact that petitioner alleged the article accused him of bigotry (and was published with actual malice—if such an allegation were otherwise sufficient) is not enough to state a cause of action when an examination of the article itself shows it does not.

The Sweeney Litigation

In 1939, a syndicated columnist wrote that Congressman Martin Sweeney opposed the appointment of one Emerich Burt Freid to the federal bench because Freid was a foreign-born Jew.

Sweeney claimed he had been libeled and embarked upon a course of litigation that for sheer perseverance is rivaled only by that of General Edwin A. Walker, the plaintiff in *Associated Press* v. *Walker*, 1967, 388 U.S. 130. Sweeney met with repeated failure as courts throughout the country dismissed virtually identical complaints, holding the alleged defamation was not libelous per se.[2]

Sweeney met with partial success only once. In *Sweeney* v. *Schenectady Union Pub. Co.*, 2d Cir. 1941, 122 F. 2d 288, the court in a two-to-one decision reversed a dismissal of the complaint, and on certiorari was affirmed by an equally divided Court, 316 U.S. 642.

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2. *Sweeney* v. *Philadelphia Record Co.*, 3rd Cir. 1941, 126 F. 2d 53; *Sweeney* v. *Capital News Co.*, S.D. Idaho, 1941, 37 F. Supp. 355; *Sweeney* v. *Caller-Times Pub. Co.*, S.D. Texas, 1941, 41 F. Supp. 163; *Sweeney* v. *Newspaper Printing Corp.*, Tenn., 1941, 147 S.W. 2d 406; *Sweeney* v. *Beacon Journal Co.*, Ohio App., 1941, 35 N.E. 2d 471, appeal dismissed, Ohio, 1941, 34 N.E. 2d 764. According to the *Caller-Times Pub. Co.* case (41 F. Supp. p. 165), similar actions Sweeney filed in still other jurisdictions were also dismissed.

Thereafter, the Court of Appeals for the District of Columbia held that the same statement was not libelous per se in *Sweeney* v. *Patterson,* supra, distinguishing the *Schenectady Union Pub. Co.* case as turning on a particular question of New York law. This Court denied certiorari in 317 U.S. 678.

Twenty-two years later, this Court quoted at length and with approval from *Sweeney* v. *Patterson* in the *New York Times* opinion, 376 U.S. 254, 272 and impliedly rejected the *Schenectady Union Pub. Co.* case, 376 U.S. at p. 268.

We submit that the *Sweeney* cases, particularly *Sweeney* v. *Patterson,* as approved by this Court in *New York Times,* are controlling on the question petitioner raises here—whether falsely accusing a public official of bigotry—is libelous per se. Thus, even if petitioner's interpretation of the article he complains of is correct—and it is not—the article is not libelous per se.

Non-Federal Grounds Argument Without Merit

Petitioner argues (Pet. 8-11) that the District Court of Appeal decided the case on unsupportable non-federal grounds whereas the controlling law is that set forth in the decision of this Court in *New York Times.*

We submit petitioner misconstrues the decisions of the Florida courts. The trial court's Order stated:

(1) ". . . the publication does not fall within the definition of libel per se as defined by the courts of Florida," and

(2) "I further find that the article complained of concerned a public official, (the Plaintiff-Mayor) and the manner in which he presided over a meeting of his council and that the article represented the opinion of the author and constitutes privileged criticism or fair comment." (R. 511).

Thus, the trial court held in effect that the publication was not libelous per se either under Florida law or under the federal law dealing with the constitutional privilege applicable to public officials.

In affirming, the District Court of Appeal cited both *Adams* v. *News-Journal Corporation,* supra, and the *New York Times* decision, thereby also holding that the article was not libelous per se either under pre-*New York Times* Florida law or under the applicable federal decisions.

We have discussed above why the article is not libelous per se on the authority of *Sweeney* v. *Patterson,* supra, and the *New York Times* decision.

In *White* v. *Fletcher,* 1956, 90 So. 2d 129, the Supreme Court of Florida anticipated the decision of this Court in *New York Times.* There, the defendant stated the plaintiff was unfit to be a police officer. In affirming a summary judgment for defendant, the court said:

> "As expressed by Mr. Justice Terrell in Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46, this Court held:
>
> > 'We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that *they* may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.' (Emphasis added).
>
> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of the City of Orlando. The generally accepted rule is that 'public officials' or 'public men' are subject to such fair comment."
>
> 90 So. 2d p. 131.

We submit it makes no sense to argue, as petitioner does, that the District Court of Appeal deliberately sidestepped a federal question when that court's opinion shows its decision is based on a decision of this Court and a decision of the Supreme Court of Florida.

Petitioner discusses the opinion of the Supreme Court of Florida in *Adams* v. *News-Journal Corporation,* supra, and attempts to distinguish it (Pet. 9). The article complained of there was about an attorney who was in the public eye; the comment and criticism of him was harsher than anything published about petitioner in the article he complains of.

We believe that decision is authority here for the proposition that, even before *New York Times,* statements such as those petitioner complains of were not libelous per se in Florida.

Clear and Present Danger Doctrine Inapplicable

Finding no support in recent decisions discussing defamation of public officials or public persons, petitioner seeks to engraft upon the constitutional privilege a combination of the "clear and present danger" doctrine and the proposition that the governed must not criticize their governors.

We do not believe any detailed discussion of the authorities petitioner cites as authority for the "clear and present danger" argument is necessary. It is sufficient to say that if the newspaper advertisement involved in the *New York Times* case was not a clear and present danger to the maintenance of law and order in Montgomery, Alabama, then criticism of petitioner's handling of a city council meeting is not likely to result in the overthrow of the government in North Miami Beach, Florida.

On his contention that harsh comment will drive educated men of refinement from public life, we refer petitioner to the *New York Times* opinion and particularly the statement:

> "If judges are to be treated as men of fortitude, able to thrive in a 'hardy climate,' Craig v. Harney, supra, 331 U.S. at 376, surely the same must be true of other government officials, such as elected city commissioners."
>
> 376 U.S. p. 273.

As to petitioner's argument that the article was a personal attack on a practicing attorney (Pet. 14), we refer him to *Sweeney* v. *Schenectady Union Pub. Co.*, supra, where the court said:

> "We are not concerned, however, with any libel on the plaintiff as a lawyer, since no reference was made in the publication to that profession of his."
>
> 122 F. 2d pp. 289-290,

and also to *Sweeney* v. *Philadelphia Record Co.*, supra, where the court said:

> "Indeed there is nothing in the published matter which connects the plaintiff in any way with the legal profession."
>
> 126 F. 2d p. 54,

and to *Garrison* v. *Louisiana*, 1964, 379 U.S. 64, 76-77, and to *Gilberg* v. *Goffi*, N.Y., 1964, 21 A.D. 2d 517, 251 N.Y.S. 2d 823.

POINT TWO

WHETHER OR NOT THE LOWER COURT COULD HAVE DISPOSED OF THE CASE BY GRANTING A SUMMARY JUDGMENT

Although he argues that the dismissal of the Complaint as amended was improper, petitioner goes beyond the Complaint itself and refers to other matters in the Record which were before the lower court when respondents' Motion for Summary Judgment was argued.

We have pointed out above how and why the lower court had pending before it at the same time the Motion to Dismiss and the Motion for Summary Judgment. When petitioner goes outside the Complaint, we do not mean in any way to criticize him for it.

But, at the same time, we feel obliged to discuss matters in the record other than the Complaint in order to respond further to petitioner's claim he was deprived of the right of jury trial.

Even if the article did libel petitioner—and we have argued above it did not—the record shows there was no actual malice. Thus, the trial court on the record before it could have reached the same ultimate result by granting respondents' Motion for Summary Judgment. There was nothing for a jury to pass on.

As the article shows, it dealt with petitioner's actions at a city council meeting when one Jack Becker accused Bill McDonald, an incumbent councilman and candidate for mayor, of anti-Semitism. This was the meeting of April 4, 1967 (R. 430).

At the council meeting the week before, the same Jack Becker, also a candidate for office, was recognized from the floor and accused a group known as the C.A.C. of Nazi

tactics (Defendants' Exhibit A for Identification, Deposition of Arthur I. Snyder, R. 426, 88).

(The C.A.C. was a group that was backing a slate of candidates for the North Miami Beach municipal elections (R. 433-434). McDonald was the candidate for mayor on the C.A.C. slate (R. 426); petitioner, the incumbent mayor, was not a candidate for re-election (R. 410) but had made known his opposition to McDonald's candidacy (R. 413).)

Almost immediately after Becker began at the March 28, 1967 meeting, petitioner cut him off, saying:

> "Mr. Becker, I don't want to go into those things. I don't want to get involved in any politics from this Council."
>
> (R. 88, 426).

At the April 4, 1967 council meeting, the same Jack Becker was again recognized from the floor, and the following occurred:

> "JACK BECKER: 'Gentlemen, a week ago tonight I came before this Council and I stated that there was an element calling themselves the C.A.C. which were using Nazi and Hitler techniques in securing votes. Tonight I'm going to show you what I got in the mail.'
>
> " 'This is a letter addressed to "Dear Blank: We would appreciate your help in getting people to support Bill. He is running against the worst element in the City and we hope and pray that the people will stand by him." Signed by Marge McDonald.'
>
> " 'I would like to know if this means that every Jew in this City is the worst element in the City.'
>
> "MAYOR SNYDER: 'Mr. Becker, we have never allowed any of that type of tactics to be used. I will not allow any of that type of representation to be used here.'

"COUNCILMAN McDONALD: 'I demand the right to answer this man.

"JACK BECKER: 'I haven't finished yet. You wait until I finish.' . . ."

(Defendants' Exhibit B for Identification to Deposition of Arthur I. Snyder, R. 428, 84).

Bill Robertson, the author of the article, testified that Snyder had cut Becker off at the March 28, 1967 council meeting as soon as Becker mentioned Nazi tactics (R. 185). He said Snyder did not attempt to cut Becker off at the April 4, 1967 meeting until after Becker had "spilled the guts" of his accusation (R. 186).

Based on Snyder's handling of Becker the week before, Robertson thought Snyder could (R. 188) and should have cut Becker off as soon as he used the words "Nazi and Hitler tactics" at the April 4th meeting (R. 189).

Robertson did not know whether Snyder knew in advance what Becker was about to say (R. 185-186). He thought Snyder must have had some indication of what Becker was going to talk about because Becker had used the same words—"Nazi and Hitler tactics"—at the earlier meeting (R. 186).

Harwell, the editor and publisher of the North Dade Journal, edited Robertson's article but did not change the substance of it (R. 330-331). As with other articles Robertson had written for the paper, Harwell assumed it was factually correct (R. 336). He relied on Robertson (R. 340).

Snyder agreed he had not attempted to cut Becker off until he mentioned the word "Jew" (R. 435). He said Becker said it awfully fast. He did not know in advance what Becker was going to say at the April 4, 1967 meeting.

If he had known, he thought he would have cut Becker off sooner (R. 443).

Thus, even if the article was libelous per se, we submit that the evidence before the lower court fell far short of proof of actual malice with the "convincing clarity" required by the *New York Times* and the "high degree of awareness of . . . probable falsity" of *Garrison* v. *Louisiana,* supra. It fell far short of showing that respondents had the "serious doubts as to the truth of . . . (the) publication" of *St. Amant* v. *Thompson,* 1968, 390 U.S. 727.

Readers of the North Dade Journal, the petitioner, or this Court may agree or disagree with those opinions and criticisms; that is not the point. The point is that Robertson wrote the article believing it to be true and the opinions he expressed were *not* "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant* v. *Thompson,* supra.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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